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OAKLAND

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

JOHN ARMSTRONG, et al.,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

Case No. C 94-2307 CW

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR ORDER TO ENFORCE ¶¶ 15-17 OF THE PERMANENT INJUNCTION

HEARING

Date: May 26, 2006
Time: 10:00 a.m.
Dept: Courtroom 2, Fourth Floor
Judge: Hon. Claudia Wilken

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INTRODUCTION

Defendants do not dispute that some of the worst abuses found in the trial of this matter seven years ago remain common today. Parolees who rely on sign language to communicate are again being put through revocation proceedings without interpreters. Persons with severe mobility impairments are again being denied access to their proceedings. In at least one case, a wheelchair user has again been forced to drag himself up stairs to participate in a parole proceeding, despite Defendants' advance notice of his disability. These abuses, amply documented in Plaintiffs' moving papers, have not been disputed or even mentioned in Defendants' Opposition. [1]

Defendants do not contest that the persistence of these abuses of the rights of *Armstrong* class members is caused by failure to implement the disability information tracking system ordered by this Court and affirmed by the Ninth Circuit.[2] On the contrary, Defendants concede that they are not in compliance with the Injunction. Defendants concede that an order should be entered finding them in violation, and directing compliance with the tracking system requirement.

Despite the clear record that their remedial efforts have failed, Defendants have, in their Opposition and Proposed Order, asked this Court to scale back the remedy ordered in Permanent Injunction. It is frankly incredible that Defendants could make such a request in light of the flagrant and uncontested violations of Plaintiffs' rights seven years after trial, and more than six years after Defendants were ordered to institute a remedy. This is not the time for the Court to scale back relief. The persistence of these violations, and their resurgence in recent months, demands a more specific and detailed remedy, not a pat on the back.

Defendants ask that the Court scale back the remedy in two critical ways. First, Defendants seek to carve out the notice step from the requirement that Defendants check their disability

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[1] Defendants' Opposition was not timely filed or served. Rice Decl. ¶ 4; Baldwin Reply Decl. ¶ 3.

[2] Defendants mischaracterize the Injunction's tracking system requirements by stating "Defendants agreed to this in the Injunction." Opp. at 4, fn.4. The Permanent Injunction terms, including the tracking system requirement, were fully litigated after trial, ordered by the Court with specific findings that Defendants violated the law and that the relief ordered was necessary and narrowly tailored. Bien Decl. ¶¶ 2-6; *Armstrong v. Davis*, 275 F.3d 849, 876 (9th Cir. 2001).

tracking system before meeting with a prisoner or parolee about a parole proceeding. Defendants' request has no support in law or fact. The contention that notice of charges and rights in a parole proceeding somehow falls outside the scope of the Injunction's requirements for tracking and effective communication is absurd. The tracking system requirements clearly apply to such notices.

Second, Defendants ask this Court to condone a mere token effort to use their disability tracking system by keeping the existing system completely walled off from the real-time networked system used to track all other data on the parole revocation process (and the system soon to be implemented for the life prisoner hearing process). The BPH operates a real-time networked system known as the Revocation Scheduling and Tracking System (RSTS) to keep track of charges, deadlines, hearing schedules and hearing results in parole revocations. Schedulers, notice agents, and hearing officers are trained and required to use RSTS during the revocation process and to record critical information there. Defendants are in the midst of making major changes to RSTS, but have refused to include data they are tracking regarding disabilities and accommodations in the system. The result is that while their staff schedule every other aspect of the parole proceeding real-time at their desks in RSTS, staff are cut off from the disability tracking system which is maintained separately in Sacramento. Defendants' only offer is to keep the disability tracking system completely separate and essentially useless. While RSTS data is continually updated and available to all key staff, the disability data will be mailed on a CD-ROM twice a month to be uploaded to one workstation in a few offices around the State. An employee scheduling parole proceedings would have to stop what they are doing, find the segregated ADA computer in the back of the office, and initiate a new search for each parolee to check on disability information.

Plaintiffs do not seek to dictate the exact contours of the system by which Defendants comply with the tracking system requirements of Paragraphs 15 and 16. Plaintiffs seek equal access to parole proceedings for class members. The ill-conceived remedial plan proposed by Defendants is unacceptable to achieve this goal. It is infeasible, fails to adequately address the requirements of the Injunction, fails to address the shortcomings of the current system, and will not ensure timely provision of needed accommodations. Moreover, it continues to segregate disability-related information into an information-systems backwater, while all the other information related

to parole proceedings is being translated into high-tech solutions.

Defendants are requesting that the Court scale back the scope of the remedy for their acknowledged violations in a manner that will inevitably result in violations of class members' rights. This request must be rejected, and an appropriate remedial process for these serious and ongoing admitted violations should be ordered. The Court has already found that the tracking system requirement in the Revised Permanent Injunction is necessary to remedy the statutory and constitutional violations found at trial, and which continue now.

The undisputed evidence shows not only the results of Defendants' failure to comply with the tracking system requirements, but also Defendants' failure to take measures to ensure that needed accommodations, such as sign language interpreters, can be obtained when needed to ensure effective communication in the parole revocation process. In the Proposed Order lodged with this Reply, Plaintiffs request that the Court direct Defendants to develop and implement a plan to provide timely accommodations at each parole proceeding.

ARGUMENT

I. DEFENDANTS HAVE CONCEDED SYSTEMIC VIOLATIONS OF THE PERMANENT INJUNCTION, THE AMERICANS WITH DISABILITIES ACT, THE REHABILITATION ACT, AND THE DUE PROCESS CLAUSE.

Defendants admit that they are systemically violating Paragraphs 15 and 16 of the Injunction by failing to maintain and check the required disability tracking system prior to parole proceedings. *See, e.g.,* Opposition at 2, 5, 7.

Defendants fail to dispute Plaintiffs' evidence that the BPT 1073 paper-based disability tracking system fails in many ways with great frequency. *See* Declaration of Holly Baldwin, signed Apr. 21, 2006 ("Baldwin Decl.") ¶ 17 (listing 11 different types of failures observed) and ¶¶ 43-59 (failures to provide accessible hearing locations and transportation to wheelchair users, and failures to provide sign language interpreters in parole proceedings for deaf signers); Declaration of Anne Mania, ¶¶ 4-7.

Defendants do not present any facts regarding actual parole proceedings for actual parolees. Instead, Defendants present declarations of three state officials, Robert Ambroselli, Alberto Caton

and Pat Cassady, describing how their paper-based disability tracking system should work in theory. The system they describe tracks the features and flaws of the wholly inadequate system already rejected by the Court after the 1999 trial. *See* Reply Declaration of Michael W. Bien ("Bien Decl.") ¶¶ 16-21. Like the 1999 system, the paper-based system described in the Ambroselli, Caton and Cassady declarations does not track disability identifications made in prior parole proceedings, and delays any real identification of accommodation needs to the very same proceeding in which the accommodation is needed, making it impossible to secure accommodations, such as sign language interpreters, that must be arranged in advance. *Id.* ¶ 21.

The only information about actual parole proceedings submitted with Defendants' Opposition is in the declaration of Mary Swanson, Project Director of the California Parole Advocacy Program ("CalPAP"). Significantly, the Swanson Declaration does not assert that the BPH actually provides accommodations needed by parolees. The Swanson Declaration makes a large-sounding estimate of accuracy of 1073s: "I believe that in over 90% of the cases that the 1073 accurately reflects the parolee's ADA/effective communication needs as documented in his/her field file." Swanson Decl. ¶ 3. Defendants' Opposition mischaracterizes this estimate by incorrectly asserting that they "successfully identify the disability of the parolees in over 90% of the cases." Opp. at 2. This misleadingly suggests that 9 out of 10 disabled parolees are identified. That is not what Ms. Swanson said. Ms. Swanson has now submitted a clarifying declaration ("Swanson Reply Decl."), filed concurrently with this reply, regarding the significance of this 90% "rough estimate." Swanson Reply Decl. ¶ 2(a). The 90% rough estimate is not 90% of the files of persons with disabilities or needs for accommodations. The figure is based on all cases received by CalPAP, whether the parolee had a disability or not. Swanson Reply Decl. ¶ 2(b).[3] Most cases do

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[3] The figure does not include cases where CalPAP receives no BPT 1073 form at all, which account for another 6% of all cases. Swanson Reply Decl. ¶ 2(c). Moreover, attorneys usually do not review the field file and thus do not compare the 1073 to the documents in the field file. *Id.* ¶ 2(d). Ms. Swanson has clarified that her reference to the field file was to the few source documents the BPH should attach to the 1073. *Id.* In 27% of cases received by CalPAP in March 2006, *for persons with disabilities identified on the 1073*, the source documents were completely missing, making any evaluation of the 1073's accuracy against field file documents impossible. *Id.* ¶ 3.

not involve disabilities at all.

Thus clarified, the large-sounding estimate of over 90% for the accuracy of the BPT 1073 process further demonstrates the depth of the violation. Even accepting this estimate, up to 10% of the approximately 78,000 parole revocation cases handled by the BPH annually fail to accurately identify disability needs through the parole revocation process. Thus, up to 7,800 cases per year contain misidentifications by this estimate. This error rate is large enough to swallow the entire developmentally disabled or learning disabled segment of the *Armstrong* parolee class, or the severely hearing-impaired segment of the class almost 10 times over. Bien Decl. ¶¶ 13-15, Exh. B at 10, 13, 15 (prevalence rates); Baldwin Reply Decl. ¶ 4, Exh. 1 (parolee population)

Most tellingly, Defendants do not contest the numerous specific examples of prisoners and parolees denied effective communication and reasonable accommodations in parole proceedings, in violation of Paragraph 17 of the Injunction, due to Defendants' failure to track disability information and pre-arrange needed accommodations. Seven years after the trial in this matter, there are still flagrant violations of the ADA and class members' constitutional due process rights as outrageous as those described in the Court's 1999 Findings of Fact and Conclusions of Law. *Compare* Bien Decl. ¶¶ 23-29 *and* Exh. B at 33-35, 58-62, 64-65 (Findings of Fact) *with* Baldwin Decl. ¶¶ 45-59 and Exh. 19-28 (current violations). This Court found that partially paralyzed and wheelchair using prisoners dragged themselves up stairs to attend hearings (Bien Decl. ¶¶ 23-24, Exh. B at 33-34); in 2005 a paraplegic wheelchair user dragged himself upstairs to meet with his revocation defense attorney (Baldwin Decl. ¶ 45). This Court found that deaf parolees were denied sign language interpreters for screening offers (Bien Decl. ¶¶ 26-27, Exh. B at 58-61); in 2005 and 2006 deaf parolees were denied interpreters for notices, attorney interviews, and probable cause hearings (Baldwin Decl. ¶¶ 46-52, 58, Exh. 11,19-25). Since filing this motion, Plaintiffs' counsel have continued to observe and report failures of the 1073 process and denials of accommodations. Baldwin Reply Decl. ¶¶ 21-24. Defendants also fail to dispute Plaintiffs' examples of class members forced to choose between timely parole proceedings and needed accommodations, blatant discrimination on the basis of disability. *See, e.g.,* Baldwin Decl. ¶¶ 46, 48, 52-56, 58, Exh. 11, 19, 21, 25-26. Plaintiffs' counsel has not encountered any sign language using parolee during

monitoring for whom interpreters were timely provided at every stage of the process. Baldwin Reply Decl. ¶ 20. For this part of the class, BPH's failure rate is likely to be close to 100%.

The tracking system requirements of the Injunction are not a formality; they are necessary to the remedy in this case. This Court noted that while an equitable remedy for constitutional and statutory violations must "accord appropriate deference to Defendants' policy preferences and interest in running their own programs," "the Court will not approve of any remedial plan that fails to provide an effective remedy that fully vindicates Plaintiffs' rights under the ADA and the Constitution." Bien Decl. ¶ 7, Exh. B at 104 (Findings and Conclusions). The Court made specific findings that the disabilities at issue may be difficult to identify in face-to-face encounters, as are the appropriate accommodations. *Id.* ¶¶ 9-14, Exh. B. Even where the disability may be self-evident, advance notice may be needed to arrange necessary accommodations. *Id.* ¶ 8. In the absence of a tracking system, notice agents and hearing officers "rely on their own abilities to assess whether prisoners or parolees understand the proceedings, determine whether a prisoner or parolee can communicate effectively, and decide whether a hearing must be postponed in order to obtain assistance for a prisoner or parolee." *Id.* ¶ 8, Exh. B at 47. Without any system for tracking prior accommodations, a disabled parolee's access to proceedings is governed by hurried individual staff judgments that are not informed by the system's prior determinations. The Court concluded that relief in this case should include a system for tracking disability-related information. *Id.*, Exh. B at 102. The Court also concluded that such relief is narrowly tailored, extends no further than necessary to correct the violation of the federal right, and is the least intrusive means necessary to correct the violation of the federal right. *Id.*, Exh. B at 105.

A. DEFENDANTS' SUGGESTION THAT NOTICE OF RIGHTS AND CHARGES IS NOT PART OF THE PAROLE REVOCATION PROCESS IS ABSURD AND MUST BE REJECTED.

Defendants argue that providing notice of revocation charges and the parolee's rights to the parolee is not part of the parole revocation process, and that they are not required to check the disability tracking system pursuant to Paragraph 16 of the Injunction prior to serving such notices (or before serving notices of any other types of parole proceedings). Opp. at 5-7. This suggestion is absurd, and must be rejected.

1. This Case Is About Equal Access to Due Process in Parole Proceedings, and Notice Is the First Element of Due Process.

Plaintiffs proved at trial that they were being denied equal access to due process in their parole proceedings, in violation of the ADA, the Rehabilitation Act, and the Fourteenth Amendment. Bien Decl., Exh. B at 81-99. As the Supreme Court recently held in Tennessee v. Lane, 541 U.S. 509 (2004), the Due Process Clause requires that the States remove obstacles to full participation in due process proceedings. Id. at 523.

Notice of charges is the first element of the minimum due process protections required in parole revocation proceedings by Morrissey v. Brewer, 408 U.S. 471, 489 (1972). See also Bien Decl., Exh. B at 94 (revocations), 95 (revocation extensions, parole date rescissions), and 98 (MDOs, SVPs). The ADA's implementing regulations also require that Defendants provide notice to prisoners and parolees of their rights under the ADA. Id. at 88, citing 28 C.F.R. § 35.106. This Court specifically found that, "Under the law, the BPT has an obligation to ensure that disabled inmates are provided reasonable accommodations to allow them to participate in BPT programs. This includes an obligation to ensure that disabled inmates are accommodated so that they have notice of their rights and understand BPT proceedings." Id. at 90-91 (emphasis added).

2. Defendants Mis-State the Record of This Case Regarding the Parole Division's Functions, Which Have Always Included Giving Notice of the Charges.

Defendants assert that "before the new [parole revocation] process, none of the functions of the parole division were enumerated" in Paragraph 16 of the Injunction, which requires Defendants to check a disability tracking system prior to meeting with a prisoner or parolee. Opp. at 6. This mis-states the record. At the time of the Permanent Injunction, the notice of rights and charges was made by a parole division employee known as a District Hearing Agent during a process known as the "screening offer." Bien Decl. ¶¶ 30-33. Notice agents employed by the parole division have always been part of the remedy. The notice continues to be conducted by parole agents. *Id.* ¶ 36. The requirements of Paragraph 16 apply to service of notices for all parole proceedings.

The Court has already found that the Board cannot avoid its responsibilities by delegating jobs to the parole and institutions divisions of CDC, that the Board has sufficient control over notice

agents to be liable for their actions, and that defendants, the Governor and the Secretary of YACA, supervised the CDC. The BPT's obligations include "an obligation to ensure that disabled inmates are accommodated so that they have notice of their rights and understand BPT proceedings. The BPT remains liable for actions of CDC employees to whom the BPT delegates responsibility for BPT programs and services." Bien Decl. ¶ 34, Exh. B at 90-91. *See also Armstrong v. Davis*, 275 F.3d 849, 877 (9th Cir. 2001) (Governor and Secretary are proper parties to the action).

In 2005, the Youth and Adult Corrections Authority (YACA) was reorganized, placing the successor organizations to the Board of Prison Terms and the California Department of Corrections — the Board of Parole Hearings (BPH) and the Division of Adult Operations and Adult Programs (AOAP) — as divisions within a single department, the California Department of Corrections and Rehabilitation (CDCR). Bien Decl. ¶¶ 48-49, Exh. G. The Division of Adult Parole Operations (DAPO) is a division within AOAP. *Id.*

Defendants' contention that the service of notice is exempted from the requirements of Paragraph 16 is nothing more than the same inter-agency finger-pointing that this Court has already condemned. *See* Bien Decl. ¶ 38, Exh. B at 5-6.

3. Defendants' Proposed Plan Does Not Address Their Failure to Provide Accommodations at Notices — Checking the Tracking System After Notice Is Completed Is Closing the Barn Door After the Horse Has Left.

Defendants agree that Paragraph 17's requirement to provide accommodations at all parole proceedings includes all stages of the process, including notice. Opp. at 5:17-6:6. But, they are not providing needed accommodations at notices of charges and rights, and they cannot do so without first checking a functional disability tracking system. Defendants have not disputed that they fail to provide timely accommodations at notices for class members. See Baldwin Decl. ¶¶ 43-59, Exh. 11, 19-28. But, Defendants' proposed remedy fails to solve the problem — it calls for the distribution of disability information on CD-ROMs, but makes no provision for anybody to check that information until after the notice has already been completed. Cassady Decl. ¶¶ 21-22. Instead, notice agents will continue to rely on the current paper system, which does not work reliably, to set up accommodations for notices. Opp. at 3. This makes no sense, as completion of

the 1073 is the first step that sets up the provision of accommodations at all other stages of parole proceedings, which in the case of parole revocations, is very time-compressed. Defendants have not even bothered to explain how they will ensure provision of accommodations at notices for revocation extensions, lifers, or MDO and SVP proceedings. Opp. at 3; Caton Decl. ¶¶ 3-4, 7, 9-10.

II. DEFENDANTS' PROPOSAL TO PUT DISABILITY TRACKING ON A LOW-TECHNOLOGY SEGREGATED SYSTEM DEMONSTRATES THEIR CONTINUED DISREGARD OF THEIR OBLIGATIONS UNDER THE AMERICANS WITH DISABILITIES ACT.

The Injunction's tracking system requirements are designed to ensure that class members receive accommodations they need for equal access to their parole proceedings. Plaintiffs do not seek to dictate the exact contours of the disability tracking system maintained by Defendants in order to comply with Paragraphs 15 and 16 of the Injunction. However, Defendants' proposal does not address the current system's ongoing failures and will not ensure provision of timely accommodations as required by Paragraph 17. Defendants' proposal to make disability information available only on a low-technology, segregated system while other tracking information speeds along in integrated real-time systems illustrates their continued disregard for ADA compliance.

A. THE CD-ROM BY MAIL PLAN IS NOT PRACTICAL.

Defendants' Opposition and the Cassady Declaration describe a plan to distribute disability and accommodation identifications on a CD-ROM mailed twice a month to 13 Decentralized Revocation Units (DRUs). Bien Decl. ¶ 39. The CD-ROM would be made from a database called ADEN (Americans with Disabilities Enforcement and Notification). Defendants did not notify Plaintiffs' counsel of any CD-ROM distribution plan prior to the filing of this motion. *Id.* ¶ 41.

The CD-ROM plan is not practical. Plaintiffs' counsel have been receiving CD-ROM copies of the Board's ADA Database information on a monthly basis from BPH Headquarters, and they do not constitute a tracking system that can be checked in real time. Bien Decl. ¶¶ 42-43. The information consists of raw text files in database tables, without any means of interface or user access. *Id.* Searching the individual text files is a painstaking and time-consuming process. *Id.* Even if Defendants did provide the DRUs with an interface (which has not been stated), uploading and transferring data from the CD-ROMs and maintaining such a system would require many hours

of technician time. *Id.* ¶ 44. CDs would be mailed from BPH to the DRUs twice a month, but additional lag time would ensue while awaiting delivery, installation, and updating at each location.

The CD-ROM plan completely fails to address Defendants' obligation to check the tracking system prior to serving notices, as discussed above in Section II. Defendants do not plan for anybody to check the ADEN database prior to notices of any kind of parole proceeding. This undermines the ability to identify and pre-arrange needed accommodations for notices, and delays the process of identifying and arranging accommodations for later steps in the process.

Defendants' CD-ROM plan also contains huge gaps. The Opposition claims that the ADEN CD-ROMs will be "made available at every facility where a Board Proceeding is held." Opp. at 4. However, the Cassady Declaration states only that the CD-ROMs will be mailed to the 13 DRU locations. Cassady Decl. ¶ 21 (p. 5). Defendants do not explain how information will be distributed to all the other places where Board Proceedings are held, or who will check the database. There are approximately 117 locations statewide where parole revocation hearings take place. Bien Decl. ¶ 45, Exh. E. In addition, revocation extension proceedings and lifer hearings happen at all of the non-DRU prisons throughout the state. *Id.* ¶¶ 45-46, Exh. F. Finally, meetings with parolees prior to MDO and SVP hearings take place in state prisons other than the DRU locations, as well as at Atascadero State Hospital and Patton State Hospital. *Id.* ¶ 47. Defendants also claim they will make the ADEN information available to CalPAP, but their plan fails to mention how this will happen. There are 11 CalPAP offices, plus a Headquarters office. *Id.* ¶ 40.

B. THE CD-ROM PLAN SEGREGATES DISABILITY AND ACCOMMODATION INFORMATION INTO A SEPARATE, SLOWER, AND LESS ACCESSIBLE SYSTEM, WHILE ALL OTHER INFORMATION CRITICAL TO THE REVOCATION PROCESS IS ACCESSIBLE IMMEDIATELY IN RSTS.

Defendants' ill-conceived CD-ROM plan is a symptom of their overall attitude toward ADA compliance. While Defendants are now rapidly upgrading their information systems for all other parts of these proceedings, prisoners and parolees with disabilities are getting left behind.

Defendants do not dispute that they could track disability and accommodations information for revocations in RSTS. Defendants have offered no justification for their plan to carve out disability information and set up a cumbersome manual uploading system, on a time-delayed basis,

on only one computer at each DRU.[4] In contrast, all other information critical to the revocation process is contained in RSTS, a real-time database available to Board and Parole employees statewide. Baldwin Reply Decl. ¶¶ 15-17. Parole staff, including notice agents, have access to RSTS, and are required to use it in to ensure that timelines are met in the new, accelerated parole revocation process. Id. ¶¶ 14-15, 17, Exh. 5; Bien Decl. ¶¶ 36-37. The Board's DRU office staff who coordinate hearings and arrange accommodations have access to RSTS. Baldwin Reply Decl. ¶ 17. The Deputy Commissioners who conduct probable cause hearings and revocation hearings have access to RSTS. Id. To comply with the Injunction and the ADA, all these staff must have access to information about disabilities and accommodation needs, but instead Defendants' plan relies on a staff person walking (or field agents driving) over to a completely separate, unwieldy, and out-of-date system, while under pressure to meet short deadlines.

Plaintiffs' counsel have been informed that Defendants are currently moving ahead with designing and implementing a statewide tracking system for life prisoner hearings, to be modeled after RSTS. Baldwin Reply Decl. ¶ 18. The lifer tracking system is required to be implemented by May 2007, pursuant to an Order in the case *In re Jerry Rutherford*, Marin County Superior Court, Case No. SC135399A. Id. Similarly, Plaintiffs' counsel has been informed that Defendants are implementing a new revocation extension tracking system, and are deliberately excluding the disability tracking features required by the Permanent Injunction. Baldwin Reply Decl. ¶ 19, Exh. 6. Plaintiffs believe that unless the Court intervenes, Defendants will design and implement another brand-new system that is high-tech in tracking all information about life prisoner proceedings and revocation extensions except inmates' disabilities and needed accommodations.

III. DEFENDANTS' PAPER PROCESS IS NO SUBSTITUTE FOR A COMPUTERIZED TRACKING SYSTEM.

Defendants do not dispute the evidence that the paper BPT 1073 process fails in many different ways with great frequency, resulting in failure to provide accommodations to prisoners

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[4] Defendants admit that they are "looking into" a system with a "faster time-frame." Opp. at 5, n.5.

and parolees with disabilities. Yet, Defendants want the Court to authorize a remedial plan that does not address these acknowledged failures.

Defendants concede in their Opposition and the Ambroselli, Cassady, and Caton Declarations that they rely on the paper-based BPT 1073 form system.[5] But, this system fails to identify needed accommodations before critical communications with parolees. The pre-notice file review does not require staff to identify what accommodations are needed or what accommodations have been provided in past proceedings. Bien Decl. ¶ 18; Baldwin Decl. ¶ 16. The attached "source documents" infrequently include information alerting staff to the particular accommodations needed by the inmate or parolee. Bien Decl. ¶ 19. Staff often fail to attach the source documents to the 1073 at all. The Swanson Declaration submitted by Defendants admits that in March 2006, "source documents" were missing in 27% of the revocation packets for which the 1073 indicated a disability or effective communication need. *Id.* ¶ 20; Swanson Decl. ¶ 4; Swanson Reply Decl. ¶ 3. In about 6% of cases, staff fail to even include the 1073 in the revocation packet. Swanson Reply Decl. ¶ 2(c); Baldwin Reply Decl. ¶ 7, Exh. 3. This means hundreds of cases every month falling through the cracks of Defendants' current tracking system.

Rather than recording and presenting information about accommodation needs previously known to the BPH and or CDC, the 1073 system relies on the parolee and notice staff to identify needed accommodations at the time of the notice, just as the pre-trial BPT 1073 process did. Bien Decl. ¶ 21. By the time a notice is occurring, it is too late to secure an accommodation that requires advance planning, such as a sign language interpreter. *Id.* When this happens, inmates and parolees are left without adequate accommodations. For example, when faced with a deaf parolee and no sign language interpreter, staff often resort to inadequate half-measures such as lip reading, which the Court has found to be inexact and conveys no more than 60% of the information being communicated, or written communication, which the Court has found is generally inadequate and

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[5] The paper 1073 process does not capture medical file data. Caton Decl. ¶¶ 3, 7, 9; Ambroselli Decl. ¶ 10. Mr. Ambroselli's statement that the field file contains all disability information from the central file (¶¶ 4-5) is unsupported. Plaintiffs' counsel have observed that the field file information is often incomplete or incorrect. Baldwin Reply Decl. ¶¶ 12-13.

should be used only as a last resort. *Id.* ¶ 12, Exh. B at 11-12; Baldwin Decl. ¶¶ 46-52, Exh. 19-25 (parolees who requested sign language interpreters but were provided none at notice); Baldwin Reply Decl. ¶ 22, Exh. 7 (same). In addition, the failure of the notice staff to adequately record the need for an accommodation, or the DRU staff's failure to note and arrange for a requested accommodation, also deprives inmates and parolees of needed accommodations at attorney interviews and hearings. Baldwin Decl. ¶¶ 46, 48, 52, Exh. 19, 21, 25 (parolees denied sign language interpreters at attorney interviews and/or hearings); Baldwin Reply Decl. ¶ 22 (same).

The 1073s provided to CalPAP attorneys frequently omit important information about disabilities and accommodation needs, resulting in denials of accommodations. For example, a paraplegic wheelchair user was held at a county jail with inaccessible facilities, and the packet provided to CalPAP did not include a 1073 or source documents indicating this need. Baldwin Decl. ¶ 45. The parolee had to drag himself upstairs to meet with his revocation defense attorney, and in at least one instance declined to participate in a proceeding due to lack of access. *Id.* The Board had known about his wheelchair-user status since at least 2001. Baldwin Reply Decl. ¶ 25.

A. DEFENDANTS REFUSE TO ACKNOWLEDGE THAT TIME MATTERS IN IDENTIFYING DISABILITIES IN ORDER TO ARRANGE ACCOMMODATIONS.

Defendants' proposal and their Opposition fail to adequately consider the importance of timely disability information in parole proceedings, focusing instead simply on the handoff of responsibilities from parole or institutions staff to Board staff. As the Court found in 1999, the failure to identify disabilities and needs for accommodation can result in denials of equal access and/or postponements of proceedings. The tracking system requirement was designed to allow Defendants to identify the need for accommodations as early as possible, and to pre-arrange those accommodations. Because Defendants' current paper tracking system fails in this regard, class members are forced to choose between postponing their parole proceedings and receiving the help they need to participate. *See, e.g.*, Baldwin Decl. ¶¶ 53-56, 58 and Exh. 11, 26 (proceedings delayed), ¶¶ 46, 48, 52 and Exh. 19, 21, 25 (parolees denied interpreters for PCH).

Defendants need an accurate real-time tracking system because steps are taken early in each parole proceeding that require advance identification of disabilities and accommodation needs, long

before the BPH starts looking at the paper packets. Life prisoners are receiving psychiatric evaluations and parole reports, making parole plans, gathering letters of support, reviewing their central and medical files, and meeting with attorneys to prepare for hearings. Detained parolees are getting their first notice of revocation charges, and attorneys are preparing to meet with their clients. MDOs are being served with parole conditions and being offered a waiver of the entire hearing process. Hearing line-ups are being set with location decisions that will determine whether the room is accessible. The lead time needed to arrange sign language interpreters is passing.

Given the difficulty of correctly identifying disabilities and appropriate accommodations, it makes no sense to do it over and over again. This information must be captured in a database that is accessible prior to first contact with the inmate or parolee, and that shows what accommodations were needed at prior proceedings. *See Armstrong v. Davis*, 275 F.3d at 876 ("Because the regulations implementing the ADA require a public entity to accommodate individuals it has identified as disabled, 28 C.F.R. § 35.104, some form of tracking system is necessary in order to enable the Board to comply with the Act."). In a vivid example of the importance of keeping current information, one of the parolees whose case was cited in support of this motion when it was filed on April 21, 2006, has now had his rights to a sign language interpreter violated again in a subsequent parole proceeding that took place *while this motion was pending*. Baldwin Decl. ¶ 52, Exh. 25; Baldwin Reply Decl. ¶ 22, Exh. 7. A wheelchair user was returned to custody twice in 13 months for parole revocations and was denied timely accessible transport to prison both times. Baldwin Decl. ¶ 59, Exh. 28. A parolee who needs a sign interpreter was subject to three revocation actions in one year without accommodations. *Id.* ¶ 50, Exh. 23.

B. DEFENDANTS HAVE DEMONSTRATED THAT THEY HAVE NOT BROUGHT SUFFICIENT RESOURCES TO BEAR TO ENSURE TIMELY ACCOMMODATIONS

This motion was brought to enforce not just the tracking system requirements of the Injunction (Paragraphs 15 and 16), but also its reasonable accommodation requirements, which are summarized in Paragraph 17:

> The BPT shall provide accommodations to prisoners and parolees with disabilities at all parole proceedings. The prisoner or parolee's request for a particular type of accommodation shall be given primary

> consideration and shall be granted unless the request is unreasonable for specific, articulated reasons allowable under the ADA, or unless other effective accommodations are available.

The uncontested evidence demonstrates that Defendants have failed to establish the necessary infrastructure in addition to the tracking system to ensure that accommodations are provided at all parole proceedings. While Defendants have distributed simple assistive devices such as magnifiers in easily available kits, they have failed to establish the resources — staff, training, technology, contracts — needed to secure accommodations that require advance planning, such as sign language interpreters. Such accommodations are regularly denied in lieu of unacceptable substitutes such as lip reading or written notes, and proceedings are regularly delayed for no reason other than the parolee's need for an accommodation. The remedy for these continued violations must include not only a tracking system to identify needed accommodations, but the deployment of resources such as contracted sign language interpreters, and the means to use them. See Plaintiffs' revised Proposed Order.

CONCLUSION

Defendants must design and implement a plan to comply with the ADA, the Rehabilitation Act, the Due Process Clause of the Fourteenth Amendment, and the Injunction. This includes a system focused on guaranteeing timely and appropriate accommodations to class members. Defendants concede they fail to comply with the Injunction by checking a tracking system of disability information to ensure that persons with disabilities can participate in their parole proceedings. In Opposition to the motion, Defendants seek arbitrary limits on the tracking system requirements that will perpetuate the egregious violations of Plaintiffs' rights that have been conclusively demonstrated in this motion. Plaintiffs respectfully request that the Court decline to enter Defendants' proposed order and instead issue the revised Proposed Order submitted with this Reply.

Dated: May 18, 2006

ROSEN, BIEN & ASARO, LLP

By: 

Michael W. Bien
Ernest Galvan
Holly M. Baldwin
Attorneys for Plaintiffs

PROOF OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the City and County of San Francisco, California, and not a party to the within action. My business address is 155 Montgomery Street, 8th Floor, San Francisco, California. On the date and in the manner indicated below, I served the following documents:

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR ORDER TO ENFORCE ¶¶ 15-17 OF THE PERMANENT INJUNCTION

REPLY DECLARATION OF MICHAEL W. BIEN IN SUPPORT OF MOTION FOR ORDER TO ENFORCE ¶¶ 15-17 OF THE PERMANENT INJUNCTION

REPLY DECLARATION OF HOLLY BALDWIN IN SUPPORT OF MOTION FOR ORDER TO ENFORCE ¶¶ 15-17 OF THE PERMANENT INJUNCTION

REPLY DECLARATION OF ANNE MANIA RE PLAINTIFFS' MOTION FOR ORDER TO ENFORCE ¶¶ 15-17 OF THE PERMANENT INJUNCTION

REPLY DECLARATION OF MARY SWANSON RE PLAINTIFFS' MOTION FOR ORDER TO ENFORCE ¶¶ 15-17 OF THE PERMANENT INJUNCTION

[PROPOSED] ORDER TO ENFORCE ¶¶ 15-17 OF THE PERMANENT INJUNCTION

ADMINISTRATIVE MOTION TO FILE UNDER SEAL; DECLARATION OF HOLLY BALDWIN

STIPULATION AND [PROPOSED] ORDER TO FILE DOCUMENTS UNDER SEAL

on the parties in said action by placing a true copy thereof in an envelope, sealing it, and causing same to be delivered to the following address:

VIA FEDERAL EXPRESS AND E-MAIL

Benjamin T. Rice
Deputy Attorney General
1300 "I" Street
P.O. Box 944255
Sacramento, CA 94244-2550
Fax: (916) 324-5205

I declare under penalty of perjury that the foregoing is true and correct. Executed this 18th day of May, 2006, at San Francisco, California.

Kim Le